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Supreme Court, U.S.
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No. 03-1238

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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May 16, 2005

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QUESTION PRESENTED

Under Section 4(a)(1) of the Portal-to-Portal Act of 1947, an employer's obligation to pay wages under the Fair Labor Standards Act of 1938 ("FLSA") does not include time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1).

The question presented is:

(1) Whether walking that occurs between compensable pre- and post-shift clothes-changing and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking . . . to and from the actual place of performance of the principal activity or activities which such employee[s] [are] employed to perform" within the meaning of Section 4(a)(1).

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption except respondents Virginia Alvarez and Maria Chavez. Petitioner notes that IBP, inc., is currently known as Tyson Fresh Meats, Inc.

Pursuant to Supreme Court Rule 29.6, petitioner states that IBP, inc., currently known as Tyson Fresh Meats, Inc., is a subsidiary of Tyson Foods, Inc. (NYSE: TSN).

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BRIEF OF PETITIONER

OPINIONS BELOW

The order of the court of appeals denying IBP, inc.'s ("IBP") petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003, is unreported, and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 83a-84a. The underlying opinion of the court of appeals was entered on August 5, 2003, is reported at 339 F.3d 894 (9th Cir. 2003), and is reprinted in the Pet. App. at 1a-34a. The findings of fact and conclusions of law of the United States District Court for the Eastern District of Washington were entered on September 14, 2001, are unreported, and are reprinted in the Pet. App. at 35a-82a.

JURISDICTION

The opinion of the court of appeals was entered on August 5, 2003, and the order of the court of appeals denying IBP's petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003. The petition for a writ of certiorari was filed on February 26, 2004, and was granted with respect to the first question presented, on February 22, 2005.[1] J.A. 53. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the following provisions of the Portal-to-Portal Act of 1947: 29 U.S.C. § 254(a)-(b); see also 29 C.F.R. §§ 790.1(b), 790.6(a)-(b), 790.7(c) & (g), 790.8(b)-(c). The pertinent text of these materials is set forth in the appendix hereto at 1a-9a.

INTRODUCTION

This case presents a fundamental question about the compensability of "walking time" under the Portal-to-Portal Act of 1947 ("Portal Act"), which amended the Fair Labor Standards Act of 1938 ("FLSA"). Section 4(a)(1) of the Portal Act excludes from the FLSA's compensation requirements the time employees spend "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1). In the decision below, the Ninth Circuit ruled that Section 4(a) does not apply to such walking time if it occurs between compensable pre- and post-shift clothes-changing and the actual work station. This decision is inconsistent with the text, purpose and history of the Portal Act, this Court's precedent, and the longstanding interpretive guidance of the Department of Labor.

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[1] This case was consolidated with *Tum* v. *Barber Foods, Inc.* (No. 04-66). J.A. 53.

As this Court has recognized, the Portal Act was a response to the expansive interpretation of the FLSA, and in particular to this Court's rulings that walking time and other ancillary activities were compensable. Congress adopted the Portal Act's walking time provision to cabin that sweeping approach and "with rare exceptions . . . to exclude . . . walking time from compensability." *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 281 (1st Cir. 2004), *cert. granted*, 125 S. Ct. 1295 (2005). By its plain terms, Section 4(a)(1) exempts from compensation the walking that occurs between compensable clothes-changing and the work station. The Department of Labor's longstanding interpretive guidance confirms this plain meaning. See 29 C.F.R. § 790.7(g) n.49. In the decision below, the Ninth Circuit disregarded this clear meaning and adopted an interpretation that produces anomalous results that bear an "uncanny resemblance" to the circumstances that prompted Congress to enact the Portal Act. *Tum*, 360 F.3d at 286 (Boudin, C.J., concurring).

STATEMENT OF THE CASE

A. Statutory Background.

1. In 1938, Congress enacted the FLSA to establish, *inter alia*, employment compensation standards. See 29 U.S.C. §§ 202, 206, 207. Sections 206 and 207 of that Act provide minimum compensation standards for certain employees (who themselves or whose employers) "in any workweek [are] engaged in commerce or in the production of goods for commerce." *Id.* §§ 206, 207. Under the Act, employers must "record, credit, and compensate employees for all of the time which the employer requires or permits employees to work." *Tum*, 360 F.3d at 279. Employers who violate the FLSA's requirements may face liability and liquidated damages. 29 U.S.C. § 216.

The FLSA neither defines the concept of work nor addresses the extent to which work-related walking (or any other ancillary activity) is compensable. This Court adopted a

broad understanding of the notion of work to include "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); see also *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) (extending concept of work even absent physical or mental "exertion" because "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen").

In a trio of cases beginning with *Tennessee Coal*, this Court concluded that travel and walking time that occurred in a variety of work-related settings constituted compensable work time. Thus, in *Tennessee Coal*, the Court held that time iron ore miners spent traveling between the portals of the mine shafts and the working faces of the mine was compensable work under the FLSA. 321 U.S. at 594-98. A year later, in *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945), the Court extended this holding to "underground travel in bituminous coal mines," explaining that compensation was required because "[w]ithout such travel the coal could not be mined," *id.* at 162-66.

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)—"the famous case that launched the Portal-to-Portal legislation," *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1292-93 (D.C. Cir. 1972)—was the culmination of this capacious understanding of compensable collateral work activities. In *Anderson*, the Court adopted a broad definition of "work" that included time spent by pottery plant employees walking to and from their work stations and in ancillary activities before and after their "productive work." 328 U.S. at 682-83. The Court reasoned that compensation was required because, "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and the employees "walked on the

employer's premises only because they were compelled to do so by the necessities of the employer's business." *Id.* at 691. Accordingly, a number of non-production activities—including walking to and from the actual work station—were brought within the ambit of compensable work.

2. In the wake of *Anderson*, there was a "vast flood of litigation" with correspondingly "vast alleged liability." 93 Cong. Rec. 2081, 2087, 2089 (1947); see *id.* at 2082 (citing the "immensity of the [litigation] problem"); S. Rep. No. 80-48, at 3 (1947) (damages totaling "$5,785,204,606" claimed in "portal-to-portal cases" filed within six months after *Anderson*). Congress's response to *Anderson* and the litigation it spawned "was strong and quick, resulting in passage of the []Portal Act at the very next session of Congress less than a year later." *Carter*, 463 F.2d at 1293. As this Court has recognized, the Portal Act "was designed primarily to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* ... would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956) (citation omitted) (quoting 29 U.S.C. § 251(a)). Congress identified a litany of harms linked to an overbroad interpretation of the FLSA, including: financial ruin for employers, gross inequity of competitive conditions and windfall payments to employees. 29 U.S.C. § 251(a).

Of relevance here, Section 4(a) of the Portal Act excludes certain "walking time," as well as unspecified preliminary or postliminary activities, from the compensation requirements of the FLSA.[2] Section 4(a) provides in relevant part that:

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[2] In addition to the FLSA, the Portal Act also applies to the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*, which governs certain government contracts, and to the Bacon-Davis Act, 40 U.S.C. § 276a *et seq.*, *reclassified at* 40 U.S.C. § 3141 *et seq.*, which governs certain federally financed construction projects, *see* 29 U.S.C. § 254.

> no employer shall be subject to any liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay . . . for . . .
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Id. § 254(a). Section 4(a) thus adopts two definitional rules: a general rule that all unspecified "preliminary" and "postliminary" activities are not compensable work, and the more specific rule that pre- and post-shift walking time is not compensable. Section 4(b) then provides that employers and employees are free to agree to compensation for walking time and any activity within the ambit of 4(a)(2), so long as the parties do so by "an express provision of a written or nonwritten contract," including a collective bargaining agreement, or a relevant "custom or practice." *Id.* § 254(b).

Shortly after the Act was passed, the Department of Labor issued interpretive guidance as to its scope. The Department explained that, even where walking time follows compensable clothes-changing that is "regarded as an integral part of the employee's 'principal activity,'" "[t]his does not necessarily mean, however, that travel between the . . . clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a)[(1)] refers." 29 C.F.R. § 790.7(g) n.49.

B. Factual Background.

IBP, inc., currently known as Tyson Fresh Meats, Inc. (referred to herein as "IBP"), is the world's largest supplier of premium beef and pork, and related products. See Pet. App. 2a. Headquartered in Dakota Dunes, South Dakota, IBP employs approximately 41,000 people across the country. Respondents, workers who were represented during the relevant time by a Teamsters Local Union, are production line employees at IBP's Pasco, Washington meat processing facility.

Although "there are considerable differences in how and where each employee dons and doffs his or her equipment," Pet. App. 54a, employees entering the Pasco facility prior to the beginning of a shift generally walk to their locker room and don various items prior to arrival at their work station; they later doff these items after leaving their work station at the end of the shift. *Id.* at 3a. These items include a sanitary outer garment, a plastic hardhat, a hair net, ear plugs, a face shield, goggles, gloves, liquid-repelling sleeves, apron and leggings, safety boots or shoes, and a weight belt. See *id.* at 4a n.2, 39a-40a. Employees who are "knife users" may wear additional items such as mesh metal aprons, leggings, vests, sleeves, and gloves, as well as plexiglass arm guards and Kevlar gloves. See *id.* at 4a n.2, 40a. Employees must be at their work station on the production line at the time the first product arrives at their station. See *id.* at 3a. Although, for a time, collective-bargaining agreements governing IBP's employees expressly included compensation for "clothes changing" time at the beginning and end of the shift, the agreements negotiated in 1982, 1986, and 1992, as well as the agreement in effect during the period of time at issue in the proceedings below, excluded "clothes changing time." *Id.* at 4a n.3, 37a-38a.

C. Proceedings Below.

1. In 1998, respondents filed a class action suit against IBP in the United States District Court for the Eastern District of Washington charging that certain of IBP's compensation practices violated the FLSA. Subsequently, a class was certified consisting of certain "'IBP processing or slaughtering division employees at [IBP]'s Pasco, Washington plant from June 30, 1995 to [August 24, 1999].'" Pet. App. 45a (alteration in original).

Of relevance here, respondents sought pay under the FLSA for reasonable time spent walking to their work stations after retrieving their work attire at their locker before the beginning of the work shifts, and time spent walking from their work stations before doffing that attire after the end of the work shifts.[3] Petitioner defended its practices, *inter alia*, on the grounds that Section 4(a)(1) of the Portal Act excludes from the FLSA's compensation requirements the time spent by employees walking between their work stations and the places where they pick up and return their clothes.

2. After a bench trial, the district court determined that the donning and doffing of certain of the attire detailed above was compensable and ruled for respondents on the compensability of related walking time. See Pet. App. 35a-82a. Specifically, the district court ruled that the donning and doffing of protective gear are "integral and indispensable to" the employees' work.[4] It thus held that the donning of such

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[3] Respondents' complaint and the opinions below addressed several other FLSA and State law issues that are not before the Court.

[4] Although the district court found that the donning and doffing of certain "non-unique protective" clothing (such as "hard hats, earplugs, frocks, safety goggles, a hair net, and boots") was "work," it held that the donning and doffing of this clothing was "not integral and indispensable to the job" and was, in any event, non-compensable because the time involved was *de minimis* as a matter of law. Pet. App. 54a & n.6. These issues are not before the Court.

gear was the start of the employees' work day, which "begins with commencement of an employee's principal activity," and that the doffing of such gear marked "the completion of the employee's activity," or work day. *Id.* at 54a. The district court then concluded that "reasonable walking time from the locker to workstation and back ... is compensable for employees required to don and doff compensable" clothing "as it occurs during the 'work day.'" *Id.*

Respondents' time-study expert, Dr. Kenneth Mericle, calculated that the "average time" for walking between the locker and the work station was 1.653 minutes for processing employees and 0.962 minutes for "kill" (slaughter) employees, Pet. App. 50a, 55a, 57a, and the district court found that this was a "reasonable amount of time required to perform" the walking at issue. *Id.* at 56a. For processing workers who retrieve compensable clothing at their lockers, then walk from the locker area to the cafeteria to obtain gloves (which most processing workers do), the district court awarded an additional 1.061 minutes of time for walking, for a total of 2.714 minutes before the work shift. See *id.* at 57a, 59a. With respect to glove wearers who do not wear other compensable gear (because the changing time for such items was excluded as *de minimis*), however, the court awarded no compensation for walking from the locker to the cafeteria. J.A. 39-40.

3. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court in relevant part. The Ninth Circuit held that respondents' donning and doffing of both "non-unique gear (e.g., hardhats) and unique gear (e.g., Kevlar gloves)" are "'integral and indispensable' to Pasco's 'principal' activity" and therefore generally compensable. Pet. App. 12a-14a. It found, however, that the "donning and doffing of non-unique protective gear such as hardhats and safety goggles is noncompensable as *de minimis*." *Id.* at 14a.

As to walking time, the court held that this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), "compels th[e]

conclusion" that, because respondents' donning and doffing is an integral and indispensable preliminary activity "'embrace[d]'" by respondents' principal work activity, "[a]ll activities performed thereafter—such as 'walking'—thus occur during the 'principal' workday and are compensable." Pet. App. 18a-19a (alteration in original) (quoting 350 U.S. at 252-53). The court rejected petitioner's argument that Section 4(a)(1) of the Portal Act makes clear that the walking time at issue here is not compensable even if it follows compensable clothes-changing. The lower court reasoned that, because "[p]laintiffs were required to obtain their protective gear from their lockers and to be present at their work stations as the first piece of meat arrived," intervening walking time also is compensable because respondents "obviously could not have worked without walking between these places." *Id.* at 19a. Acknowledging that the First Circuit had reached a contrary conclusion, the Ninth Circuit reasoned that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Id.* at 19a & n.10.

On February 26, 2004, IBP filed a petition for a writ of certiorari, which was granted on February 22, 2005, limited to the first question presented. J.A. 53.

SUMMARY OF ARGUMENT

The Ninth Circuit's interpretation of the Portal Act "pushes so far that it threatens to undermine" a primary purpose of that Act: excluding pre- and post-shift walking time from mandatory compensation. *Tum*, 360 F.3d 281. Not only can the holding below not be reconciled with the relevant statutory text, Congress's plain purpose in enacting the Act, or the Department of Labor's longstanding interpretive guidance, but also it would lead to a series of anomalous results. Accordingly, the Ninth Circuit's walking time holding should be reversed.

By its plain terms, the Portal Act defines pre- and post-shift walking as an activity that is not mandatorily compensable under the FLSA, leaving employees and employers free to determine the compensability of such time by contract, custom or practice. Specifically, the Act provides that "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is not subject to mandatory compensation. 29 U.S.C. § 254(a)(1). Here, the "principal activity" respondents are hired to perform is indisputably meat processing, not clothes-changing, and the "actual place of performance" of this activity is the meat-processing work station, not the locker rooms or cafeteria where employees retrieve or don and doff their work gear. Accordingly, the pre- and post-shift time that respondents spend walking to and from the work stations where they actually process meat falls squarely within the scope of Section 4(a)(1) and is therefore not subject to the mandatory compensation requirements of the FLSA.

The Ninth Circuit ignored the plain meaning of subsection (a)(1), however, based on a clear misunderstanding of this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). *Steiner* concluded that certain integral and indispensable clothes-changing and showering falls outside the scope of subsection (a)(2), which provides that unspecified "preliminary" and "postliminary" activities are not subject to mandatory compensation under the FLSA. *Steiner* nowhere purported to determine when the "workday" commences, or to address the compensability of any pre- and post-shift walking that immediately follows compensable clothes-donning or immediately precedes compensable doffing. Indeed, the Court in *Steiner* expressly stated that its analysis of subsection (a)(2) does not apply to pre- and post-shift activities that are "specifically excluded by Section 4(a)(1)." *Id.* at 256. Thus, *Steiner* does not "compel" the conclusion that, once any integral and indispensable clothes-changing

occurs, the compensable workday automatically begins even though the employees have not yet arrived at their actual work stations.

The history and purpose of the Portal Act confirm that pre- and post-shift walking time is not compensable, and that *Steiner* cannot be read to override Section 4(a)(1)'s clear language when such walking time immediately follows or precedes compensable clothes-changing. The walking time provision was enacted to undo this Court's pre-Portal Act precedent, which provided broad compensation for pre- and post-shift walking time, and to ensure that pre- and post-shift walking time is outside the scope of mandatory FLSA compensation. In enacting this categorical exclusion for walking time, Congress was fully aware that some pre- and post-shift walking could occur immediately after or before compensable clothes-changing. Moreover, the *Steiner* Court was fully aware that Congress had adopted subsection (a)(1) to repudiate its walking time decisions. It is inconceivable that, in a case involving the scope of subsection (a)(2), this Court would have purported to alter the scope of subsection (a)(1), without a word of acknowledgment that it was doing so.

The Department of Labor's longtime interpretive guidance, drafted shortly after the passage of the Portal Act, confirms subsection (a)(1)'s plain meaning. The agency expressly acknowledges that, even where clothes-changing is considered integral to the principal activity, and therefore compensable, intervening travel "between the ... clothes-changing place and the actual place of performance of the specific work the employee is employed to perform" may still be governed by subsection (a)(1). 29 C.F.R. § 790.7(g) n.49.

The Ninth Circuit's approach also should be rejected because it leads to the kind of anomalous results that prompted Congress to enact the Portal Act. For example, the artificial notion of the workday adopted by the court below would result in compensation for pre- and post-shift walking

depending on the fortuity of where the first item of compensable gear is stored, rather than concerns of efficiency or convenience. Employees with differences in where their compensable gear is retrieved would experience disparate compensation that, in turn, complicates time-keeping for employers and creates dissatisfaction among employees. By dramatically decreasing the applicability of the walking time exclusion—despite clear evidence that Section 4(a)(1) is an absolute bar to mandatory compensation for pre- and post-shift walking time—the Ninth Circuit's approach causes the very harms that prompted passage of the Portal Act: financial strain on employers facing newfound liabilities; "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; and, as labor costs increase, an increase in the cost of goods and services to all consumers, including the government. 29 U.S.C. § 251(a).

ARGUMENT

I. THE TIME EMPLOYEES SPEND WALKING BETWEEN COMPENSABLE CLOTHES-CHANGING AND THEIR ACTUAL WORK STATIONS IS NOT COMPENSABLE UNDER SECTION 4(a) OF THE PORTAL ACT.

The text, purpose and history of Section 4 of the Portal Act demonstrate that the time employees spend walking between compensable pre- and post-shift clothes-changing and their actual work stations is not subject to mandatory compensation under the FLSA, unless made compensable by contract (such as a collective-bargaining agreement), custom or practice.

A. The Text Of Section 4(a)(1) Of The Portal Act Makes Clear That The Walking Time At Issue Here Is Not Compensable.

Although the Ninth Circuit gave no serious consideration to the text of Section 4(a)(1), see Pet. App. 18a-19a, "[i]t is

elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); *accord Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). The text of Section 4(a)(1) demonstrates that time spent walking between the place where compensable clothes are obtained and an employee's actual work station is not mandatorily compensable.

Under Section 4(a), employers are not required to provide compensation under the FLSA for an employee's:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a).[5]

Because Congress did not define the terms used in Section 4, courts must "look to the ordinary meaning of these terms," *Rousey* v. *Jacoway*, —U.S.—, 125 S. Ct. 1561, 1568 (2005);

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[5] The remainder of Section 4(a) has no relevance here. It was added by the Small Business Job Protection Act of 1996 "to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles." S. Rep. No. 104-281, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1474.

see also *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). As the Court has explained, the term "'principal'" typically means "'most important, consequential, or influential.'" *Commissioner* v. *Soliman*, 506 U.S. 168, 174 (1993) (quoting *Webster's Third New International Dictionary* 1802 (1971)). Thus, an employee's "principal activity" is the most important or consequential task (or tasks) the employee was hired to accomplish. As applicable here, the "principal activity" respondents are "employed to perform" is processing meat, not changing clothes.

Section 4(a)(1) expressly excludes from mandatory compensation the time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1). The phrase "actual place of performance" necessarily refers to the place where the employee performs the important or consequential task (or tasks) he or she "is employed to perform." See, *e.g.*, *Carter*, 463 F.2d at 1294 (the "'actual place of performance'" of locomotive operators' principal activity "is the locomotive itself," not the assignment board that engineers had to check each day before walking to their assigned locomotive); *Ralph* v. *Tidewater Constr. Corp.*, 361 F.2d 806, 808-09 (4th Cir. 1966) (for employees building the Chesapeake Bay bridge, "actual place of performance" was the bridge itself, not the dock where employees boarded a boat for daily ride to and from their work sites). Here, the "actual place" where respondents perform their "principal activity" of processing meat is the work station where they engage in such processing—not the locker room or cafeteria where they retrieve the clothes they must wear at their work stations.

Finally, the walking time at issue here occurs "prior to the time on any particular workday at which such employee

commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). As just noted, the relevant walking takes place before each respondent "commences," or after each respondent "ceases," his or her "principal activity" of processing meat. Thus, by its plain terms, Section 4(a)(1) exempts from compensation the time that respondents spend walking to and from their work stations. On this basis alone, the decision below should be reversed.[6]

B. Nothing In This Court's Decision In *Steiner* Justifies Departing From The Plain Meaning Of Section 4(a)(1).

Rather than apply Section 4(a)(1) in accordance with its plain meaning, the Ninth Circuit ruled that this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), "compels" the conclusion that the "workday commence[s] with the performance of a preliminary activity that [is] 'integral and indispensable' to the [employee's] work," and that "any activity occurring thereafter in the scope and course of employment [is] compensable." Pet. App. 18a. *Steiner*, however, neither compels nor even justifies any deviation from the plain meaning of Section 4(a)(1). Indeed, *Steiner* addressed the meaning of subsection (a)(2), and expressly reaffirmed that subsection (a)(1) excludes pre- and post-shift walking time from the FLSA's compensation requirements.

The issue in *Steiner* was whether battery plant employees who worked with "dangerously caustic and toxic materials" were entitled to compensation for time spent changing clothes

[6] Where, as here, statutory terms are unambiguous, "judicial inquiry is complete, except in rare and exceptional circumstances." *Garcia* v. *United States*, 469 U.S. 70, 75 (1984) (internal quotation omitted); *see United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.").

"before . . . the direct or productive labor for which [they were] primarily paid," 350 U.S. at 248, and for "shower[ing] and chang[ing] back at the end of [the productive work] period." *Id.* at 251. The employer argued that the time spent on such activities was expressly excluded from the FLSA's compensation requirements by Section 4(a)(2), which excludes "activities which are preliminary to or postliminary to" the employees' principal activity. This Court rejected that argument, concluding

> that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act *if* [1] those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and* [2] are not specifically excluded by Section 4(a)(1).

Id. at 256 (emphases added).[7]

Contrary to the Ninth Circuit's view, *Steiner* does not purport to determine when the "workday" commences, nor does it hold that all activities that occur after an integral and indispensable activity are compensable. This Court held only that activities that are "integral and indispensable" to the employees' "principal activity" are themselves compensable, and therefore outside the scope of subsection (a)(2), which generally renders "preliminary" and "postliminary" activities non-compensable except by agreement. The Court thus ruled

[7] The Court reiterated this construction in *Steiner*'s sister case, *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), in observing that in:

> *Steiner*, . . . we concluded that . . . activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] *if* [1] those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and* [2] are not specifically excluded by Section 4(a)(1).

Id. at 261 (holding that knife sharpening is a compensable "principal" activity of butchers in meatpacking plant) (emphases added).

that the employees were to be compensated for the 30 minutes they spent changing clothes and showering each day, *id.* at 251; it nowhere held that the time employees spent walking between the locker room where these activities occurred and the production line was also compensable. See *Tum*, 360 F.3d at 281 n.5 ("*Steiner* concerned only time spent in the donning and doffing of special protective equipment and in required protective showers. *Steiner* did not purport to say that all time walking to where that equipment is stored, waiting to retrieve and return it, and then walking to the time clock is compensable.").

Despite the narrowness of *Steiner*'s actual holding, the Ninth Circuit read the decision as (1) equating "integral and indispensable" activities with "principal activities," (2) thereby implicitly holding that an employee's first "integral and indispensable" activity triggers the start of the workday, (3) and thus placing any pre- and post-shift walking time that occurs immediately after the first, or immediately before the last, integral and indispensable activity entirely outside the scope of subsection (a)(1). Each link in this daisy chain of reasoning is mistaken. First, the Court could have simply held that the clothes-changing at issue in *Steiner* was in fact the employees' first "principal activity," if that is what the Court believed. By instead employing the concept of an "integral and indispensable" activity—a concept that does not appear in Section 4(a) itself—the Court necessarily recognized that the clothes-changing was not itself a principal activity.

Second, if *Steiner* had equated "integral and indispensable" activities with principal activities, it would have had to confront the obvious and awkward implications that such an interpretation raised. As noted above, Section 4(a) does not simply refer to "principal activities," but rather to "principal activities" that "commence[]" and "cease[]" at an "actual place of performance" for such activities. 29 U.S.C. § 254(a). If clothes-changing were the "principal activity" that started

the workday, the *Steiner* Court would have been forced to decide either (1) that an activity could be an employee's "principal activity" even though it occurred in a locker room and not on "the production line," 350 U.S. at 251-52, where "the production of batteries, the 'principal activity' in which these employees were engaged," *id.* at 249, took place, or (2) that the locker room, and not the production line, was the "actual place of performance" of the employees' principal activity. The fact that *Steiner* did not grapple with either of these issues confirms that it was simply deciding the scope of non-compensable "preliminary" and "postliminary" activities under subsection (a)(2), and not re-defining the phrase "principal activity" in a manner that would also alter the scope of subsection (a)(1).

Third, *Steiner* explicitly confirmed that its interpretation of subsection (a)(2) did *not* affect the scope or applicability of subsection (a)(1). The Court stated that activities performed "before or after the regular work shift" are mandatorily compensable only if they are "an integral and indispensable part of the principal activities" that the employees were hired to perform "*and are not specifically excluded by Section 4(a)(1).*" *Id.* at 256 (emphasis added). Thus, the *Steiner* Court recognized that Section 4(a)(1) continues to place pre- and post-shift walking time outside the FLSA's mandatory compensation requirements even when such walking occurs between other pre- and post-shift activities that are subject to mandatory compensation.[8]

Finally, the Ninth Circuit's reading of *Steiner* fails to recognize that Section 4 of the Portal Act is not itself the source of affirmative obligations. The Ninth Circuit read

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[8] In effect, the Ninth Circuit read *Steiner* as though it stated that pre- and post-shift activities are compensable if they are (1) integral and indispensable to a principal activity *or* (2) occur after the first and before the last such integral and indispensable activity. That is manifestly not what this Court held.

Steiner as determining the content of a statutorily-specified event (first "principal activity") that serves as a trigger for statutory liability for the compensable "workday." But this is not the nature or structure of Section 4(a). As petitioner explains in greater detail below, Section 4(a) was enacted to override this Court's construction of compensable "work." Section 4(a) does this by adopting a general definitional rule—that unspecified pre- and post-shift activities (*i.e.*, "preliminary" and "postliminary" activities) are not mandatorily compensable work—and a more specific rule—that pre- and post-shift walking time is not mandatorily compensable work. In light of this structure, it is clear that this Court's conclusion that integral and indispensable clothes-changing falls outside the scope of the general rule simply means that such clothes-changing is mandatorily compensable work. That conclusion says nothing about the compensability of *other* pre- and post-shift activities, such as walking. And that is precisely why this Court cited subsection (a)(1) in its final holding in *Steiner*: to emphasize that its clarification of the scope of one of the Act's general definitional rules did not detract from the need to address the applicability of the Act's other definitional rule when deciding the compensability of pre- and post-shift activities.

In sum, *Steiner* certainly does not compel this Court to ignore or override the plain language of Section 4(a)(1). The Court should therefore apply Section 4(a)(1) in accordance with its plain terms, and hold that respondents' walking time is not subject to mandatory compensation under the FLSA.

C. The History And Purpose Of The Portal Act Confirm That The Walking Time At Issue Here Is Not Compensable.

The history and purpose of the Portal Act amply confirm that Section 4(a)(1) applies to walking time that follows compensable clothes-donning (or precedes compensable clothes-doffing). See generally *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (plurality

opinion) ("[t]he purpose of Congress is the ultimate touchstone" of statutory interpretation) (internal quotation omitted). That history shows that Congress intended *all* pre- and post-shift walking to be uncompensated except pursuant to contract, custom or practice. Moreover, because it was universally recognized that Congress adopted the Portal Act to overturn this Court's prior interpretations of the FLSA, it is inconceivable that, in *Steiner*, this Court would have altered the scope of Section 4(a)(1)—a provision expressly designed to overrule the Court's previous walking and travel time decisions—without even a single word of acknowledgment that it was doing so.

1. The Portal Act Superseded This Court's Interpretations Of The FLSA, Including The Court's Conclusion That Walking And Travel Time Are Compensable.

A proper understanding of Congress's purpose in enacting the Portal Act necessarily begins with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)—"the famous case that launched the Portal-to-Portal legislation," *Carter*, 463 F.2d at 1292-93. In *Anderson*, the Court ruled that "the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace" and, thus, that "the time spent in these activities must be accorded appropriate compensation." 328 U.S. at 690-91. Under this ruling, employees were entitled to compensation for the "30 seconds" to "8 minutes" of walking time from the plant entrance "to their respective places of work" prior to "the start of productive work," as well as for "various preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, [and] putting on finger cots." *Id.* at 682-83, 690. The Court reasoned that this walking time was compensable because, "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and the

employees "walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business" *Id.* at 691.[9]

Anderson followed other cases in which the Court took an equally broad view of mandatorily compensable work. In *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), the Court observed that work is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 598. This reasoning rendered travel time compensable, requiring compensation for underground travel between the portals of mine shafts and the working faces of mines. See *id.* at 594-98; *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945). Compensation was due, this Court reasoned, because "[w]ithout such travel the coal could not be mined," *id.* at 162-66; thus, this travel time "partakes of the very essence of work," *id.* at 170.

Not only did these cases "contradict[] actual pay practice within the industries and create[] large overhanging liabilities for employers," *Tum*, 360 F.3d at 284 (Boudin, C.J., concurring), but also they prompted a "vast flood of litigation" involving "vast alleged liability," 93 Cong. Rec. at 2087, 2089; *id.* at 2082 (noting the "immensity of the [litigation] problem"). Congress found that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and

[9] The Court also recognized a "*de minimis*" exception to an employer's obligation to provide compensation under the FLSA. *See Anderson*, 328 U.S. at 692 ("We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible," such as "[w]hen the matter in issue," *i.e.*, walking time after punching time clocks, "concerns only a few seconds or minutes of work beyond the scheduled working hours . . . ."). As noted above, certain of respondents' donning and doffing activities are noncompensable as *de minimis*. Pet. App. 13a-14a, 54a & n.6.

employees, thereby creating wholly unexpected liabilities, immense in amount." 29 U.S.C. § 251(a). Congress further found that, if the courts continued to interpret the FLSA so broadly, numerous harms would befall the national economy including: "financial ruin of many employers" and "serious[] impair[ment of] the capital resources of many others"; "gross inequity of competitive conditions between employers and between industries"; "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; and the cost of goods and services to the government "be[ing] unreasonably increased," including "serious[]" increases in the "cost of war contracts." *Id.*

Congress's response was notably "strong and quick, resulting in passage of the Portal-to-Portal Act at the very next session of Congress less than a year" after the *Anderson* decision. *Carter*, 463 F.2d at 1293. Congress acted "to remedy what were deemed to be some harsh results of [the Court's] decision in *Anderson* . . . , which held that time necessarily spent by employees walking to work on the employer's premises and in preliminary activities after arriving at their places of work was working time within the scope of the [FLSA]." *Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 61 (1953); *accord Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 780 (1981) ("Portal-to-Portal Act. . . . was intended to curtail the numerous suits for unpaid compensation and liquidated damages under the FLSA that were filed after this Court's decision in *Anderson*").

The congressional record is replete with references to cabining *Anderson*'s broad approach. For example, the Senate Report states that the Portal Act was meant to render activities, "such as the preliminary activities which were involved in the [*Anderson*] case," subjects of bargaining, not

statutory mandates. S. Rep. No. 80-48, at 47.[10] Likewise, Senator Cooper, a sponsor of the Portal Act, stated that, in cases such as *Anderson*, "the courts went too far," in that "activities were held to be compensable when logically and equitably there should be no compensation [for such] activities." 93 Cong. Rec. 2287, 2296 (1947) (statement of Sen. Cooper). Indeed, Senator Cooper referred to *Anderson*'s ruling that employees be paid for walking to their place of productive work as one of the most extreme aspects of that decision: "the [*Anderson*] case further extended that doctrine, by holding that under certain circumstances other activities—even walking time—might be considered compensable." *Id.* at 2293 (statement of Sen. Cooper); see also H.R. Rep. No. 80-71 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1029, 1030 (Portal Act responded to *Anderson*'s holding that "time spent in walking on the employer's premises to the work station and time spent in certain preliminary and incidental activities must be included in the compensable workweek").

The clear purpose of Section 4(a)(1), therefore, was to make a fundamental shift away from *Anderson*, by ensuring that pre- and post-shift walking and travel time is outside the scope of mandatory FLSA compensation. Thus, Senator Cooper explained that "clearly and definitely, as to the future, an employee cannot receive compensation for *any* walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. at 2297 (statement of Sen. Cooper) (emphasis added). Likewise, the Senate Report makes plain that Section 4(a)(1) would relieve an "employer from liability for travel time from the portal of

[10] *See Garcia*, 469 U.S. at 76 (treating Committee Reports as "'authoritative'" guide to legislative intent). In the case of the Portal Act, *Steiner* found the floor debates—and particularly statements by the Act's sponsors—to be especially relevant. 350 U.S. at 254. Further, because the enacted version of Section 4 followed the Senate bill, the Senate history generally is considered "more persuasive" than the House debate. *Id.*

a mine to its face unless such time is compensable by contract or by a practice or custom." S. Rep. No. 80-48, at 48.

Moreover, the evolution of Section 4(a)(1)'s language underscores that Congress did not intend the walking time at issue here to be compensable. An early proposal simply referred to walking to and from the "actual place of work of the employee." *A Bill to Exempt Employers From Liability for Portal-to-Portal Wages in Certain Cases, and for Other Purposes: Hearings on S. 70 Before a Subcommittee of the Committee on the Judiciary*, 80th Cong. 655 (1947) (hereinafter, "Judiciary Committee Hearing"). Participants at a Senate Judiciary Committee hearing expressed the view that the phrase "actual place of work" meant "the place at which [the employee] goes to work. . . . [I]t does not mean the gate, it does not mean the premises, it does not mean the clock. It means the place at which the [employee] goes to work," *id.* at 656 (statement of Mr. Pettit), where an employee "begins his activities at some prescribed hour," *id.* (statement of Sen. Cooper), or "some prescribed place," *id.* (statement of Mr. Pettit).

In response, Senator Cooper expressed concern that the "actual place of work" language would not go far enough or be clear enough to capture the intended concept: "If that is not defined in some way, the actual place of work, according to the Jewell decision would be at the portal [of the mine shaft], and you would be back where we started." *Id.* (statement of Sen. Cooper).[11] Accordingly, Senator Cooper suggested that the legislation include additional language

[11] Ironically, in response to this concern, the hearing witness expressed doubt that:

> any court would say that legislation enacted for the purpose of getting rid of walking time, which provided that 'walking time' should not be deemed time worked under the act, until you reached your actual place of work, that the court would turn around and say that that started where the [employee] starts walking.

Judiciary Committee Hearing, *supra*, at 657 (statement of Mr. Pettit).

further defining the "actual place of work," such as "that place where the scheduled hours of work begin." *Id.* at 657. Following these discussions, the language was changed to "the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1).

2. The Portal Act's Purpose And History Foreclose The Ninth Circuit's Reading Of Both Section 4(a)(1) And *Steiner*.

The purpose and history of the Portal Act foreclose any claim that Congress mandated compensation for walking that follows compensable clothes-donning or precedes compensable clothes-doffing.

Fundamentally, the Ninth Circuit's core rationale—that the walking time at issue here is compensable because employees "obviously could not have worked without walking between" the place where they retrieve compensable clothing and their actual work station, Pet. App. 19a—bears a close resemblance to the root logic of *Anderson*, namely, that pre- and post-shift walking time is compensable because "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved," 328 U.S. at 691. But, by enacting the Portal Act, Congress decisively rejected this capacious understanding of mandatorily compensable pre- and post-shift walking time.

Numerous statements by the Act's sponsors and in the legislative reports reveal unmistakably an intent to exclude from the FLSA's compensation requirements any and all walking to and from the actual place where employees perform the principal activities for which they are employed. Indeed, the Senate Report states expressly that the Act precludes mandatory compensation for:

> [w]alking, riding, or traveling to and from the actual place of performance of the [employee's] principal activity or activities within the employer's plant, mine,

> building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out.

S. Rep. No. 80-48, at 47.

Moreover, at the time they categorically stated that such walking time is excluded, the members of Congress and the Senate Judiciary Committee were fully aware that walking could occur between compensable clothes-changing and the place where employees perform their principal tasks. Because the earliest drafts of the Act provided that employers were not relieved of liability with respect to an activity made compensable by contract, custom or practice,[12] Senator Cooper and other members of the Senate Judiciary Committee necessarily understood that walking could occur in circumstances comparable to those presented here—*i.e.*, after clothes-donning or before clothes-doffing that was compensable by virtue of a contract, custom or practice (rather than, as here, a finding of indispensability). Yet Senator Cooper and the Committee repeatedly stated that "an employee *cannot* receive compensation for *any* walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. at 2297 (statement of Sen. Cooper) (emphasis added); see S. Rep. No.

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[12] *See* Judiciary Committee Hearing, *supra*, at 4 (defining "work" as "'only those activities of an employee . . . which are specifically paid for as such by his employer, either pursuant to practice or custom at the plant or other specified place where such employee is employed, or pursuant to the express provisions of an agreement at the time in effect between such employer and such employee, his agent, or collective bargaining representative'"); *id.* at 6-8 (reprinting H.R. 584, which provides that "[n]o action, whether or not commenced prior to the effective date of this Act, shall be maintained, to the extent such action is . . . based upon failure of an employer to pay an employee for activities heretofore or hereafter engaged in by such employee other than those activities which at the time of such failure were specifically required to be paid for either by custom or practice . . . or by express agreement").

80-48, at 47 (walking time excluded "irrespective of" when it occurs).

In fact, Senator Cooper recognized that clothes-changing could be compensable precisely because it was deemed integral to an employee's principal activity. Indeed, it was his floor statement that *Steiner* cited in support of its holding. See 350 U.S. at 254 & n.5; *id.* at 258. He undoubtedly knew that walking could immediately follow or precede such compensable clothes-changing, yet stated categorically that all walking time was excluded from the FLSA's compensation requirements. See 93 Cong. Rec. at 2297. In explaining the basis for this categorical rule, moreover, Senator Cooper rejected the rationale of the Ninth Circuit below. That court reasoned that integral and indispensable donning and subsequent walking are "embraced" by respondent's principal activity and therefore are compensable. But, Senator Cooper explained that "*[w]alking*, riding, or traveling time to the place where the principal activities are performed *has been eliminated as a principal activity.*" *Id.* (statement of Sen. Cooper) (emphasis added).

The purpose and history of the Act also render the Ninth Circuit's interpretation of *Steiner* utterly implausible. It is indisputable that the Act was adopted to reverse a number of this Court's interpretations of the FLSA—particularly its ruling concerning walking time. Indeed, as noted, just three years before *Steiner*, this Court acknowledged that Congress acted "to remedy what were deemed to be some harsh results of [the Court's] decision in *Anderson* . . . , which held that time necessarily spent by employees walking to work on the employer's premises . . . was working time within the scope of the [FLSA]." *Unexcelled Chem. Corp.*, 345 U.S. at 61; see also *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 523 n.1 (1950) (Congress found that "*Anderson* . . . misconceived the purposes of Congress.") (Frankfurter, J., dissenting). Yet, as the Ninth Circuit interprets it, *Steiner* effectively overrode this congressional judgment in a wide range of circumstances,

by ruling that a principal activity necessarily embraces all indispensable clothes-donning and all reasonable subsequent time spent walking to the actual place of work.

There is simply no basis for assuming that this Court disregarded Congress's will. *Steiner* is firmly grounded in congressional intent (as ascertained by the methodology of the time); the Court explicitly based its ruling on the Act's legislative history and, in particular, on the colloquy in which Senator Cooper explained that employees were to be compensated for clothes-changing where they "could not perform [their principal] activity without putting on certain clothes." 350 U.S. app. at 258; *id.* at 254 & n.5 (citing same to show that "the Senate intended the activities of changing clothes and showering to be within the protection of the Act if they are" integral and indispensable to the principal activity). Given *Steiner*'s fealty to congressional intent, its complete failure to mention compensation for related walking time, and its express *caveat* that pre- and post-shift activities were not mandatorily compensable if they were "specifically excluded by Section 4(a)(1)," *id.* at 256, *Steiner*'s holding is properly understood to require mandatory compensation *only* for the time actually devoted to "integral and indispensable" clothes-changing and showering.[13] *Steiner* cannot properly be understood as re-instating, *sub silentio*, its earlier—and congressionally repudiated—understanding of compensable pre- and post-shift walking time whenever such walking is related to other pre-and post-shift activities that are compensable.

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[13] In fact, the clear import of the colloquy *Steiner* cited is that the compensation due is for the actual time spent changing clothes. *See* 350 U.S. app. at 258 (citing statement of Sen. Cooper that "the time used *in changing into those clothes* would be compensable") (emphasis added).

D. Agency Interpretive Guidance Buttresses The Conclusion That Walking Time Is Not Mandatorily Compensable.

The Department of Labor's longtime interpretive guidance further supports the conclusion that the walking time at issue here is not subject to mandatory compensation under the FLSA.

Shortly after enactment of the Portal Act in 1947, the Wage and Hour Division of the Department of Labor issued interpretive guidance "to outline and explain the major provisions of the Portal Act" and "to indicate the effect of the Portal Act upon the future administration and enforcement" of the FLSA. 29 C.F.R. § 790.1(b). Although the Department "has no authority to promulgate legislative rules in this area," *Tum*, 360 F.3d at 281,[14] as noted in *Steiner*, in amending the FLSA in 1949, Congress stated that the Secretary of Labor's then-existing interpretative guidance—including the provisions cited herein—"'shall remain in effect as an ... interpretation'" of the Portal Act. 350 U.S. at 255 & n.8 (quoting 29 U.S.C. § 208 note (former Section 16(c)).

Most notably, the Department acknowledged that, even if "the changing of clothes may in certain circumstances be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity,'" and therefore compensable:

> [t]his does not necessarily mean, however, that travel between the ... clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[14] Indeed, all of Subchapter B of the Secretary's interpretive guidance, *see* 29 C.F.R. §§ 775.0-794.144, is entitled "Statements Of General Policy Or Interpretation Not Directly Related To Regulations."

29 C.F.R. § 790.7(g) n.49 (citing colloquy between Senators McGrath and Cooper). Like this Court's decision in *Steiner*—which also relied extensively on colloquies between Senators McGrath and Cooper—the Department's adoption of this explanation makes clear that a compensable "integral and indispensable" activity does not render compensable all time spent walking between that activity and the actual work station. See *Tum*, 360 F.3d at 280 (relying on this provision to reach a result contrary to that of the court below).

Furthermore, the Department's interpretive regulations confirm the role that the "actual place of performance" language plays in establishing the boundaries of the walking time provision. See 29 C.F.R. § 790.7(c) (walking time "to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do"). The regulations provide that the "workday" is the period "'from whistle to whistle,'" *id.* § 790.6(a), such that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there," *id.* § 790.6(b). Here, respondents must be at their work station on the production line at the time the first product arrives at their work station. See Pet. App. 3a. Accordingly, the "whistle to whistle" in this case runs from the time respondents must arrive at their work stations until the time they finally leave those posts at the end of the shift.

Thus, the interpretive regulations—adopted shortly after passage of the Portal Act and subsequently ratified by Congress—reflect the understanding that, while certain pre- and post-shift activities may be so integral to an employee's work that they are compensable, see *id.* § 790.8(b)-(c), this does not override the bounds of Section 4(a)(1). Accordingly, the time an employee spends walking "to and from the actual place of performance of the principal activity or activities

which [an] employee is employed to perform," 29 U.S.C. § 254(a)(1), is not mandatorily compensable simply because it immediately follows compensable clothes-donning, or immediately precedes compensable doffing. A contrary rule that renders walking time compensable whenever it is related to pre- and post-shift activities deemed compensable under *Steiner* would create a vast loophole in Section 4(a)(1)'s categorical treatment of walking time and be irreconcilable with its text.

II. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 4(a)(1) LEADS TO ANOMALOUS RESULTS AND THE KIND OF HARMS THE PORTAL ACT WAS DESIGNED TO AVOID.

The Ninth Circuit's reading of Section 4(a)(1) also should be rejected because it would lead to anomalous results and recreate the very kinds of problems that prompted passage of the Portal Act in the first place. See *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 202-03 (2000) (courts should avoid interpretations that "create anomalous results" in light of the "practical consequences").

A. The Ninth Circuit's Interpretation Of Section 4(a)(1) Leads To A Host Of Anomalous Results.

As the First Circuit pointed out, an "automatic rule that any activity that satisfies the 'integral and indispensable' test itself starts the workday" "would lead to [] absurd result[s]." *Tum*, 360 F.3d at 280.

Chief among these absurdities is that compensation for walking time would depend on the fortuity of where compensable gear happens to be located. Thus,

> a worker who picks up and puts on a required [compensable clothing item] at the plant entrance—an activity integral to a principal activity under *Steiner* (as extended by the lower courts)—then must be compensated for everything else that happens (*e.g.*, walking and waiting to pick up more equipment, walking to the time clock at the production floor entrance, waiting to punch in).

Id. at 285 (Boudin, C.J., concurring). By contrast, an employee at the same hypothetical facility who obtains and dons that item at the work station would receive no compensation for pre-shift walking time, even though the exertion from the employee's perspective would be identical.[15] Accordingly, employers can seek to avoid or minimize compensable walking time "by placing all of the items at one location instead of at a few locations" or by placing changing locations closer to work stations. *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003). But these decisions would be driven not by a legitimate concern for efficiency, but by an artificial effort to avoid liability for walking time Congress never intended to make compensable. Thus, whether walking is compensable would depend on the chance of where employees retrieve their compensable gear.

Similarly, the district court's ruling has incongruously disparate effects on two groups of workers: those whose only compensable item of clothing is gloves and those who wear gloves and other compensable items of clothing. Gloves are not stored in lockers, but rather are laundered daily and distributed in the cafeteria. See Pet. App. 59a; J.A. 39-40. As to processing employees whose only compensable gear is gloves, the district court did not award compensation for the walk from the locker to the cafeteria (1.061 minutes), but rather only for the general walk to the work station (1.653

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[15] Analogously, the *Anderson* Court recognized the problem of fortuity with respect to compensating employees based on when they get in line to clock-in. Because all employees cannot punch-in simultaneously, "[t]he first person in line at the clock would be checked in at least 8 minutes before the last person." 328 U.S. at 690. In such a case, "[i]t would be manifestly unfair to credit the first person with 8 minutes more walking time than credited to the last person due to the fortuitous circumstances of his position in line." *Id.*

minutes). See Pet. App. 57a; J.A. 39-40.[16] Accordingly, as between two employees whose lockers are side by side, an employee who stores just one compensable item in his locker will receive 64 percent more compensable walking time (2.714 minutes, instead of 1.653 minutes) even if the two employees walk together to the cafeteria to pick up their gloves. See *id.*

Nor is this the only incongruously disparate effect of the Ninth Circuit's rule. Although many employees begin their day at a supply room picking up certain supplies, see Pet. App. 40a-41a, the whites and the frocks that are retrieved there daily are not compensable items, see *id.* at 56a & n.9. Thus, the district court did not award walking time from that point, but rather only from the point that an employee arrives at his or her locker (for employees who store compensable items there). See *id.* at 54a, 60a. But, the district court found "considerable differences" in how and where employees donned their clothing. *Id.* at 54a. As the employees testified at trial, many went to their locker first to obtain a hard hat and/or other items before going to the supply window. See Trial Tr. at 266:8-25 (docket 1000), 427:15-428:2 (docket 1001), 591:17-592:6 (docket 1003), 856:19-857:20 (docket 1005). As a result of the rulings below, such employees effectively are compensated for traversing the distance between the locker room and the supply window, even if picking up only non-compensable items at the supply window, whereas walking the same distance in the reverse order is not compensable even if employees pick up compensable items at the supply window.

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[16] Although the 1.061 minutes is listed in the "kill" column of the district court's order, Pet. App. 57a, there is no dispute that this time, in fact, refers to "processing" employees, *see* J.A. 39-40. Nor is there any dispute that other walking time numbers in the district court's order, *see* Pet. App. 57a (1.091 minutes for "kill" workers and 1.352 minutes for processing workers), relate exclusively to the meal period and were removed by the Court in its order on objections, *see* J.A. 39-40.

The Ninth Circuit's holding also ignores that integral and indispensable make-ready time will often be relatively brief. As the First Circuit pointed out, the Ninth Circuit's approach "may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal." *Tum*, 360 F.3d at 284. In practice, walking time will frequently, and perhaps usually, take more time than the supposed triggering events. Thus, the mere fact that an employee engages in a few minutes of integral and indispensable preliminary or postliminary activities would, under the Ninth Circuit's approach, result in many more minutes of compensation for walking that the employees otherwise would do *without* compensation.

For example, in this case, under the opinions below, employees who store in their locker only items for which they are not entitled to compensable clothes-changing time (such as safety glasses, hard hat, ear plugs and/or hair net) are not considered to have commenced work at their locker. See Pet. App. 54a & n.6, 56a-57a & n.9 (asterisked items), 60a. But, according to the Ninth Circuit, the addition of a single "compensable" item to the locker commences the work day and renders compensable walking that takes place thereafter. Thus, by merely adding a plexiglass armguard to the locker, which takes .091 minutes (*i.e.*, 5½ seconds) to don, an employee would be compensated for the subsequent walking time. That walking time is nearly three minutes for a processing division employee who walks from the locker to the cafeteria to get gloves (1.061 minutes) and then to the work station (1.653 minutes). See *id.* at 57a. This result, mandated by the Ninth Circuit, means that two employees whose lockers are side by side and walk the same distance to their work stations would be compensated differently

depending on whether one of them had a single compensable item among the gear in his or her locker.[17]

The legislative history makes clear that the Portal Act was designed to eliminate, not foster, such illogical and unfair discrepancies. See S. Rep. No. 80-48, at 40. As the Senate Report noted, in pre-Portal Act lawsuits, individual workers sought compensation for their own individualized walking time involving "countless individual judgments for amounts that will vary from worker to worker"; the Report also concluded that "[t]he possibilities for dissatisfaction between employees in such a situation are very great. Those who receive amounts smaller than are received by their fellow workers are likely to be disgruntled in many instances. The net effect could well be very unsettling upon labor peace and productivity." *Id.*

Moreover, the Ninth Circuit, disagreeing with the district court, found that all of the items at issue in the case are "'integral and indispensable,'" Pet. App. 12a-13a, but did not alter the district court's finding, *id.* at 56a-57a & n.9 (items marked with asterisk), that six of these items are excluded

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[17] It is no answer to any of these discrepancies and incongruities to argue that they can be resolved through litigation over the reasonableness of walking time or compensable gear location. The complex record-keeping associated with such efforts is itself something the Portal Act was designed to spare employers. During Senate debates, Senator Donnell, one of the Senate Managers involved in the Conference Report, explained that,

> when an employer has neither a contract nor a custom under which his employee was to be entitled to compensation for walking time, *it is not fair or just to require the employer to keep records upon such a maze of details as would be necessary in order to keep track of how far each employee walked*, or how long it took each employee to tape his arms, or raise the window, or grease his arms, or don his overalls, or whatever the case may be.

93 Cong. Rec. 2254 (Mar. 18, 1947) (emphasis added).

from compensation by virtue of 29 U.S.C. § 203(*o*),[18] see Pet. App. 14a-17a. The Ninth Circuit's analysis therefore produces the following discordant result in situations where non-*de minimis*, indispensable clothes-changing is indisputably excluded from compensation by Section 3(*o*): donning or doffing such clothes would not constitute "hours worked" under Section 3(*o*), but would trigger compensation requirements for related walking time. It is bizarre that a non-compensable act could trigger the compensability of acts that follow (and that otherwise are not themselves compensable). But this is the logical—though absurd—effect of Section 3(*o*) upon "integral and indispensable" donning if that term is simply equated with "principal" activity.

B. These Anomalies Cannot Be Justified On The Ground That The "Workday" Commences With The First Integral And Indispensable Act.

None of the foregoing anomalies and incongruities is justified by the Ninth Circuit's belief that an integral and indispensable act necessarily commences the workday. Pet. App. 19a.

As petitioner has shown, *Steiner* neither held, nor compelled the conclusion, that integral and indispensable clothes-changing commences the "workday" and renders all post-donning or pre-doffing walking time mandatorily compensable. See *supra*, § I.B-C. Nor is it true, as the Ninth Circuit asserted, that once compensable activities are commenced, they may not thereafter be "stopped while the

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[18] Section 3(*o*) provides, in relevant part:

> [i]n determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes . . . at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(*o*).

employee is walking to his station, then recommenced when the walking is done." Pet. App. 19a. In fact, the Department of Labor's interpretive regulations lead to precisely this conclusion and affirmatively reject the very rule the Ninth Circuit adopted. See *supra*, § I.D.[19]

The Ninth Circuit's logic also fails on its own terms. It ruled that, once commenced, the workday cannot be stopped and re-started because work time is "continuous, not the sum of discrete periods." Pet. App. 19a. But it upheld a judgment that compensated respondents only for the "*reasonable*" time they spent walking to and from the work station before and after their shifts. Thus, contrary to its own stated rationale, the lower court's judgment effectively does permit the workday to start (with compensable clothes-changing) then stop (at the end of any reasonable period for walking, if workers take a longer amount of time to reach their stations), then re-commence (at the work station). As a result, the judgment effectively does provide compensation for "discrete periods," and is therefore flatly inconsistent with the notion, embodied in the regulation the lower court cited, *id.* at 18a, that the workday actually commences with the first integral and indispensable act, since employees must be paid for all time "within that [workday] whether or not the employee engages in work throughout all of that period." 29 C.F.R. § 790.6(b).

In short, the Ninth Circuit's rule that the workday commences with the first integral and indispensable activity is neither compelled nor justified by the notion that compensable time must be continuous in nature. And the incongruities and anomalies that such a rule spawns are more than sufficient to demonstrate that, although compensable,

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[19] The Department's espousal, in recent litigation, of an "automatic rule that any activity that satisfies the 'integral and indispensable' test itself starts the workday, regardless of context," *Tum*, 360 F.3d at 280, is flatly inconsistent with its longstanding interpretive guidance.

integral and indispensable activities cannot be equated with "principal activities" for purposes of determining when the compensable workday begins. Indeed, as the First Circuit explained, the Ninth Circuit's misconception in this regard "threatens to undermine" the primary purpose of the Portal Act: excluding walking time from mandatory compensation. *Tum*, 360 F.3d 281. As in this case, interpretations of Section 4(a)(2) will, under the Ninth Circuit's rule, dramatically narrow the applicability of the walking time exclusion, despite clear evidence that Section 4(a)(1) is an absolute prohibition on compensation for pre- and post-shift walking time. That narrowing, in turn, can lead to enormous liabilities, causing the very harms that prompted passage of the Portal Act: financial strain on employers facing newfound liabilities; "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; and, as labor costs increase, an increase in the cost of goods and services to all consumer, including the government. 29 U.S.C. § 251(a).

Congress made clear that employers and employees can agree to compensation for pre- and post-shift walking by contract, custom or practice. Congress made equally clear, however, that courts may not award compensation for such time in the absence of such an agreement. The Ninth Circuit has done serious violence to the plain language of Section 4(a)(1) and the purposes that motivated Congress to treat walking time as non-compensable except pursuant to agreement, and its reasons for doing so do not withstand scrutiny. If any expansion of compensation for walking time is to be adopted, "the proper venue for resolving that issue remains the floor of Congress." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 (1998).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

29 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act [41 U.S.C. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

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APPENDIX B

29 C.F.R. § 790.1. Introductory statement.

* * * *

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

* * * *

29 C.F.R. § 790.6. Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by

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[3] Sections 790.23 through 790.29 in the prior edition of this Part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with

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[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in Part 785 of this chapter.

this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[57] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[58] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

[57] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[58] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

29 C.F.R. § 790.7. "Preliminary" and "postliminary" activities.

* * * *

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which Section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one

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[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Cong. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act.[46]

* * * *

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

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[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in Part 785 of this chapter.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. § 790.8. "Principal" activities.

* * * *

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

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[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

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preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.